Supreme Court, U. S.
FILED
SEP 18 1980
MICHAEL RODAK, JR., CLERK

80-449

IN THE

SUPREME COURT OF THE UNITED STATES

NO. _____

IN RE: WALTER STRAUS & SON, INC., PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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September 17, 1980

QUESTIONS PRESENTED FOR REVIEW

1. Whether a Court of Appeals has power to grant a Writ of Prohibition and/or Mandamus prohibiting a transfer of a cause under 28 U.S.C.A. 1404 after the case has already been transferred to another Circuit.

2. Whether the Court of Appeals erred in granting the Writ of Prohibition and/or Mandamus because a sufficient showing was not made by Stone to justify same.

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IN RE: WALTER STRAUS & SON, INC., PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE SUPREME COURT OF THE UNITED STATES:

OPINIONS BELOW

On July 22, 1980 the Court of Appeals for the Fifth Circuit granted an Application for Writ of Prohibition and/or Mandamus filed by Stone Commodities, Inc. to restrain a transfer under 28 U.S.C. 1404. At this time there has been no written opinion as such so there is no official report but a copy of the complete order is appended as required by Rule 23(a)(i) Supreme Court Rules. A Motion for Rehearing was denied September 11, 1980.

STATEMENT OF JURISDICTION

On July 22, 1980, the Court of Appeals for the Fifth Circuit entered the order which granted an Application for Writ of Prohibition and/or Mandamus filed by Stone Commodities, Inc. in this cause. A motion for stay of mandate was granted by the Court of Appeals for the Fifth Circuit on August 5, 1980 to allow Petitioners to file its Application for Writ of Certiorari. A motion for rehearing was filed August 4, 1980 and overruled on September 11, 1980. The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether a Court of Appeals has power to grant a Writ of Prohibition and/or Mandamus prohibiting a transfer of a cause under 28 U.S.C.A. 1404 after the case has already been transferred to another Circuit.

2. Whether the Court of Appeals erred in granting the Writ of Prohibition and/or Mandamus because a sufficient showing was not made by Stone to justify same.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following are the full texts of the applicable statutes.

28 U.S.C.A. 1404

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.
>
> (b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or

hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending.

(d) As used in this section, "district court" includes the United States District Court for the District of the Canal Zone; and "district" includes the territorial jurisdiction of that court.

28 U.S.C.A. 1651

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

On June 13, 1980 the Honorable Robert Porter, U.S. District Judge for the Northern District of Texas entered his order transferring cause #CA-3-78-1017 styled Walter Straus & Son, Inc. v. Stone Commodities, Inc. to a companion case in the Eastern District of California cause #5-77-488 LKK styled Maid-Rite v. Straus. Thereafter on June 23, 1980 the U.S. Clerk in Dallas sent the original file to the Eastern District of California. On July 1, 1980 the Eastern District entered its order in respect to the case. The movant for the writ below Stone Commodities on July 7, 1980 filed its

Application for Writ with the Court of Appeals for the Fifth Circuit and on July 22, 1980 the Writ was granted. Stone never moved to stay the original transfer order, the transfer was not stayed and the District Court in California is proceeding with both cases in spite of the Writ granted by the Fifth Circuit. The following is a capsule of the background facts demonstrating how this unusual situation arose.

Maid-Rite (located in Sacramento, California) purchased some hams from Walter Straus & Son, Inc. (located in Dallas, Texas), who had in turn previously purchased the hams from Stone Commodities (located in Chicago, Illinois). These hams were ultimately declared unfit by the U.S.D.A. and destroyed. Maid-Rite filed suit in California against Straus, Stone and also Roeglein, the producer (located in San Antonio, Texas). At an early stage of the litigation Stone and Roeglein were dismissed from the litigation because Maid-Rite did not demonstrate any proof to show jurisdiction.[1] At that time Straus had no action filed against Stone or Roeglein.[2] Straus "vouched in" Stone and Roeglein, but Stone and Roeglein denied the same and refused to indemnify Straus even though from discovery it was clear Straus could not have possibly done anything to the hams because neither it nor any of its employees ever touched the hams. If anything was wrong with the hams the parties agree it was caused either by the producer, Roeglein[3] or Maid-Rite, the purchaser, who did some curing after receipt of the hams. After it became

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1 The California District Court has now changed the prior ruling by accepting jurisdiction after the transfer.

2 2.607 Uniform Commercial Code.

3 Who now has indemnified Stone, but refuses to do the same with Straus.

obvious Straus was entitled to indemnify, it filed suit in Dallas, Texas against Stone alleging indemnity and/or contribution. Stone again denied liability. Straus was then pushed in to a position of having to defend a lawsuit in California which although it might legally be liable, for which it certainly had no direct responsibility and come back to Dallas, Texas and possibly relitigate the same issues for indemnity. Most of the fact witnesses reside in either the Eastern District of California or the Southern District of Texas[4]. The District Court in Dallas sought to end this piece-mealing of litigation by granting a motion to transfer the Texas case to California. As previously stated the order was entered on June 13, 1980.

Thereafter on July 1, 1980 Stone mailed its Application for Writ of Prohibition and/or Mandamus to the Court of Appeals for the Fifth Circuit which was received on July 7, 1980.[5] No application for a stay of the transfer was ever requested or entered. The Court of Appeals thereafter entered its order complained about without a written opinion. The District Court in California has now conducted a pre-trial on both causes and takes the position that since the case has actually been transferred then the Fifth Circuit has no jurisdiction to effect a retransfer.

REASONS FOR GRANTING THE WRIT

This case has the unique fact situation of a writ of mandamus or prohibition being granted to prohibit the 1404 transfer when the Court of Appeals for the Fifth

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4 Roeglein offices are in San Antonio, Texas and outside subpoena power for the Northern District of Texas.

5 After the transfer to California was complete.

Circuit has no power over the California District Court and results in a conflict of circuits.

The ruling of the Fifth Circuit is in direct conflict with Starnes v. McGuire, 512 F.2d 918 (D.C.Cir. 1974), In re Southwestern Mobile Homes, Inc. 317 F.2d 65 (5 Cir. 1963), Drabik v. Murphy, 246 F.2 408 (2d Cir. 1957), State of Utah v. American Pipe and Const. Co., 316 F.Supp. 837 (D.C.Cal. 1970), Tharp v. Transworld Drilling Co., 367 F.Supp. 521 (D.C.Okla. 1973). Petitioner submits that this is a most important procedural question previously undecided by this Court as to (1) whether a writ of prohibition or mandamus can be granted to prohibit a 1404 transfer after transfer is complete and if so (2) what standards should be applied before granting such writ. For these and the other relevant reasons under Rule 19(b) Supreme Court Rules, Petitioner believes the Application appropriate and satisfies the necessary review criteria for certiorari.

For years it has been held that once a motion for transfer under 28 U.S.C. 1404(a) has been granted, and the papers actually transferred to the Clerk of the transferree Court, the transferor court and the Court of Appeals for the Circuit in which the transferor court is located loses jurisdiction of the case and may not proceed further with it. Starnes v. McGuire, 512 F.2d 918 (D.C.Cir. 1974). In re Southwestern Mobile Homes, Inc., 317 F.2d 65 (5 Cir. 1963), Drabik v. Murphy, 246 F.2d 408 (2 Cir. 1957), State of Utah v. American Pipe & Const. Co., 316 F.Supp. 837 (D.C.Cal. 1970), Tharp v. Transworld Drilling Co., 367 F.Supp. 521 (D.C.Okla. 1973). See also, Blakenship v. Allis-Chalmers Corp., 460 F.Supp. 37 (D.C.Miss. 1978) and Kearney & Trecker Corp. v. Cincinnati Milacron, Inc., 403 F.Supp. 1040 (D.C.Ohio 1975) aff'md 562 F.2d 365 (6 Cir. 1977). This long established rule of law has now been completely overturned by the Fifth Circuit without guidelines to work from, even if the Court was correct in granting the Writ.

Petitioner recognizes that A. C. Neilsen Co. v. Hoffman, 270 F.2d 693 (7 Cir. 1959) and Farrell v. Wyatt, 408 F.2d 662 (2 Cir. 1969) are apparent exceptions to the previously cited holdings. A. C. Neilsen Co. v. Hoffman, supra, is easily distinguished in that the transfer and the application for writ were filed the same day and there was no proof as to which came first. In our present case there is no question the application was filed after transfer was complete. Petitioner submits that Farrell v. Wyatt was simply not correctly decided. That case operated on the legal fiction that if the transferor court was not a situs where suit could have been brought that the transfer is a nullity and it can be reviewed by the circuit in which the transferor sits. Such a ruling is without specific authority and as said in Wright, Miller & Cooper Federal Practice and Procedure: Jurisdiction Sec. 3846

> "The case authority for either of these escapes is very slim, and they each create possibilities of unseemly duplication of effort, and perhaps even inter-circuit conflict, if an appeal is going forward in one circuit while the papers are lodged in a district court in another."

The rule of Farrell v. Wyatt can only lead to a situation where there is a conflict between Courts and results from the indifference of the movant for a writ in failing to ask for a stay. Indeed that is exactly what has now developed. The District Judge in California has taken the position that the Court of Appeals for the Fifth Circuit does not have any jurisdiction or power over him and has conducted a pre-trial subsequent to the grant of the writ and has indicated that he will try both cases in California regardless of the granting of the Writ by the Fifth Circuit. This procedure is not desirable or even practical and could easily be avoided by a stay of transfer having been requested and granted. Unless this Court accepts this application additional potential

chaotic situations like this can and will develop. Petitioner submits that it is poor judicial economy and that this case has the exact facts which lends it to appropriate relief.

Stone Commodities whole argument has been that because the California District Court let Stone out when orignally sued in California by Maid-Rite that this ruling automatically prohibited the Texas District Court from re-evaluating the situation and automatically voided the transfer order. Even if correct the writ should not have been granted after the transfer. Petitioner further submits Stone's rationale accepted by the Fifth Circuit was incorrect.

The prior order was not res judicata or collateral estoppel because it was not a final judgment. Remember that while Straus was an original party to the California litigation, it was not involved in the jurisdictional argument at the time it occured, only Maid-Rite was involved. Indeed the California Court had the authority and power to change the original order and especially is this true when the issue is jurisdictional. In the present case either the producer of the hams Roeglein or Maid-Rite, the Plaintiff in the California suit, caused the hams to be defective and Straus believes it can sustain in personan jurisdiction over Stone in California and that the transfer was correct. Stone has a right to challenge jurisdiction over it after the transfer and has in fact so done. Assuming the California District Court rules it has jurisdiction over Stone[6] then one is forced with opposite rulings in two circuits on the same case, all because of the writ being granted after transfer.

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6 The Court has indicated to California counsel for Straus, that it intends to maintain the combined suit in California.

Certain commentators have questioned whether there should be any interlocutory review of transfer orders under 28 U.S.C.A. 1404(a) at all. American Law Institute. Study §§ 1305(a), 1306(2), 1315(a) and 1327(a). Also Ellicott Mach Corp. v. Modern Welding Co., Inc., 502 F.2d 178 (4 Cir. 1974). On a broader spectrum the various circuits are divided on the proper test to use in a 1404 transfer.[7] An example of one test used as set out in A. Olnick & Sons v. Dempster Bros., 365 F.2d 439 (2 Cir. 1966):

> "we should make clear, in accord with these decisions of leading judges, that we will not listen to discussions whether a district judge made an error, clear-cut or otherwise, in deciding whether or not to transfer, but will entertain applications for mandamus as to transfer orders only when there is an issue of transferability or a substantial claim that the judge has refused to exercise or has usurped judicial power."

The present Straus case serves as a prime example that a writ of mandamus or prohibition is not appropriate in a 1404 transfer and only lends iself to duplicate appeals and splitting apart common lawsuits. If Straus can sustain jurisdiction in California the transfer was clearly correct, if Straus can not sustain jurisdiction in California then Stone has the appropriate remedies in California to contest the matter, but in neither situation should a writ of mandamus or prohibition be granted.

Again in our case there is no question but that the transfer was appropriate except for the jurisdictional

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7 See Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction Sec. 3855.

question. This is simply a question like any other judicial ruling - - it was right or wrong and this is not a situation in which a writ should be considered or granted. Petitioner submits that if a writ of mandamus is allowed in this case, then there is nothing more than a piecemealing of litigation which is exactly what was sought to be avoided by 1404.

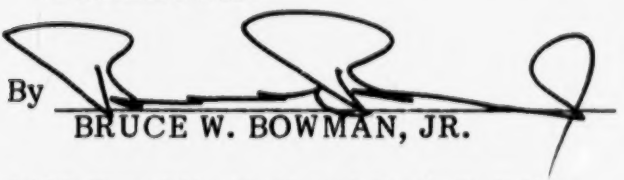
CONCLUSION

Petitioner urges this fact situation will allow the Court to specifically prohibit a writ of mandamus or prohibition from being granted after a 1404 transfer and avoid inter-circuit conflicts and also to outline the appellate tests of writ review in a 1404 transfer proceeding. In so doing the Court can also help an innocent defendant caught in a procedural quagmire.

WHEREFORE, Petitioner prays that a Writ of Certiorari be granted and that upon hearing the Writ of Prohibition and/or Mandamus be overruled and transfer allowed.

Respectfully submitted,

TURNER, RODGERS, SAILERS, JORDAN & CALLOWAY



By BRUCE W. BOWMAN, JR.

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(214) 748-8465

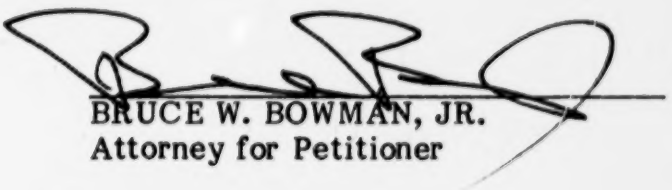
Counsel For Walter Straus & Son, Inc., Petitioner

DATED: September 17, 1980

PROOF OF SERVICE

I, BRUCE W. BOWMAN, JR., an attorney for Petitioner, Walter Straus & Son, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of September, 1980, I served three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit upon Henry W. Christopher, Jr., Johnson & Christopher, 210 Park North Professional Building, 4402 Vance Jackson, San Antonio, Texas 78230, and to the Honorable Robert W. Porter, U. S. District Judge, 1100 Commerce, Room 15E26, Dallas, Texas 75242, by certified mail, return receipt requested.

I further certify all parties required to be served have been served.



BRUCE W. BOWMAN, JR.
Attorney for Petitioner

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
JUL 25 1980
GILBERT F. GANUCHEAU
CLERK

UNIT A

No. 80-1693

In Re:

STONE COMMODITIES CORPORATION,

Petitioner.

- - - - -

On Petition for Writ of Mandamus and/or Prohibition
to the United States District Court for the Northern District of Texas

- - - - -

Before GEE, RUBIN and RANDALL, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus and/or prohibition is GRANTED.

Supreme Court, U.S.
FILED
OCT 16 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 80-449

IN RE: WALTER STRAUS & SON, INC., PETITIONER

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR STONE COMMODITIES CORPORATION, RESPONDENT

October 6, 1980

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 80-449

IN RE: WALTER STRAUS & SON, INC., PETITIONER

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

OPINIONS BELOW

The Court of Appeals for the Fifth Circuit on July 22, 1980 granted the Petition for Writ of Prohibition and/or Writ of Mandamus filed by STONE COMMODITIES CORP. to vacate an Order of transfer made under 28 U.S.C. §1404(a). In accordance with Rule 23(a)(i) Supreme Court Rules, a copy of the complete Order is appended to the Petition of WALTER STRAUS & SON, INC. A Motion for Rehearing was denied on September 11, 1980.

STATEMENT OF JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether a Court of Appeals has power to grant a Writ of Prohibition and/or Mandamus prohibiting a transfer of a cause under 28 U.S.C. §1404 after the case has already been transferred to another Circuit.

2. Whether the Court of Appeals erred in granting the Writ of Prohibition and/or Mandamus because a sufficient showing was not made by Stone to justify same.

STATUTE INVOLVED

The federal statute here involved is 28 U.S.C. §1404, which provides:

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.
>
> (b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.
>
> (c) A district court may order any civil action to be tried at any place within the division in which it is pending.
>
> (d) As used in this section, "district court" includes the United States District Court for the

District of the Canal Zone; and "district" includes the territorial jurisdiction of that court.

STATEMENT OF THE CASE

Petitioner in this Court, WALTER STRAUS & SON, INC., filed an Original Complaint on August 15, 1978 against STONE COMMODITIES CORPORATION, Respondent in this Court, in the United States District Court for the Northern District of Texas in Civil Action No. CA 3-78-1017-F. In the Texas action, WALTER STRAUS seeks indemnity and/or contribution from STONE COMMODITIES arising out of a transaction involving the sale and brokering of alleged contaminated hams. At the time the Original Complaint was filed by WALTER STRAUS, there was and is now pending an action in the United States District Court for the Eastern District of California in CIV S-77-488-TJN, entitled MADE-RITE SAUSAGE COMPANY, PLAINTIFF VS. WALTER STRAUS & SON, INC., ET AL, DEFENDANTS, in which STONE COMMODITIES was originally named as a party Defendant. In the California action MADE-RITE SAUSAGE asserted a cause of action against WALTER STRAUS, a Texas Corporation, from which MADE-RITE SAUSAGE had purchased a shipment of hams; STONE COMMODITIES, an Illinois Corporation, which had acted as a broker in the transaction; and ROEGLEIN COMPANY, a Texas Corporation, which produced the hams and sold the hams to STONE COMMODITIES.

WALTER STRAUS did not "vouch in" STONE COMMODITIES in the California action as alleged in the Petition of WALTER STRAUS. Rather, WALTER STRAUS elected to institute a direct action against STONE COMMODITIES in the Northern District of Texas for indemnity and/or contribution. It is undisputed that the prior pending action in the Eastern

District of California involves issues similar to those involved in the Texas action, and the outcome of which may render the issues involved in the Texas action moot.

On April 17, 1978, the Eastern District of California entered an Order dismissing STONE COMMODITIES from such cause upon grounds that the United States District Court for the Eastern District of California lacked in personam jurisdiction over STONE COMMODITIES. Such Order of Dismissal is a final and subsisting Order of the Eastern District of California. Subsequently, on June 21, 1979, the Northern District of Texas entered an Order postponing the trial of the Texas action and staying further proceedings therein pending the outcome of the California action, recognizing that a determination of the issues in the California action might render litigation of the Texas action unnecessary. Thereafter, on March 20, 1980, WALTER STRAUS filed its Motion for Change of Venue under Title 28 U.S.C. §1404(a), seeking a transfer of the Texas action to the Eastern District of California, thereby consolidating both actions and re-engaging STONE COMMODITIES therein in the posture of a third-party defendant. On June 13, 1980, the Northern District of Texas granted the motion of WALTER STRAUS and ordered a transfer to the Eastern District of California. The papers were physically transferred by the U.S. Clerk for the Northern District of Texas to the Eastern District of California on June 23, 1980. On July 1, 1980 an Order was entered assigning the related cases to the same Judge within the Eastern District of California.

Thereafter, on July 3, 1980, STONE COMMODITIES filed its Petition for Writ of Prohibition and/or Writ of Mandamus with the United States Court of Appeals for the Fifth Circuit, and on July 25, 1980 the Writ of Mandamus was granted which ordered the Northern District of Texas to vacate the Order of transfer

entered on June 13, 1980. On or about August 8, 1980, STONE COMMODITIES filed a Motion to Dismiss in the Eastern District of California based upon that Court's lack of in personam jurisdiction and upon the prior Order of Dismissal rendered by that Court. Contrary to the representation of WALTER STRAUS in its Petition, under a Status Order dated August 13, 1980, a complete copy of which is appended hereto, the Eastern District of California, in recognition of the jurisdictional question presented, has expressed its intention to abide by the decision of the Fifth Circuit on the application for Writ of Mandamus in deference to that Court's authority over this controversy, and has stayed all further action in said proceeding until WALTER STRAUS' Petition for Writ of Certiorari is adjudicated.

ARGUMENT

The decision of the U.S. Court of Appeals for the Fifth Circuit granting a Writ of Mandamus was correct. There is no conflict or any other basis for further review by this Court.

1. The issue here presented has previously been decided by this Court in Hoffman vs. Blaski, 363 U.S. 335, (1960). There this Court held that in transferring a case under §1404(a), the transferor Court may transfer an action to another district only if the transferee district was one in which the action "might have been brought" by the Plaintiff. The Court stated at 80 S. Ct. 1090:

> "If when a suit is commenced, Plaintiff has a right to sue in that District, independently of the wishes of Defendant, it is a District 'where the action might have been brought.' If he does not have that right, independently of the wishes of Defendant, it is not a District 'where it might have been brought,' and it is immaterial that

> the Defendant subsequently makes himself subject, by consent, waiver of venue, and personal jurisdiction defenses or otherwise, to the jurisdiction of some other forum."

Therefore, this Honorable Court refused to permit a Defendant to cause an action to be transferred to another district because such transferee district was not one in which the action might have been brought by the Plaintiff in the first instance. Certainly, if a Defendant who affirmatively seeks a transfer under §1404(a) cannot obtain a transfer under such circumstances, a protesting Defendant such as STONE COMMODITIES cannot constitutionally be required to submit to the jurisdiction of a transferee district which was not one in which the action "might have been brought" by the Plaintiff. It has long been recognized that §1404(a) does not authorize the transfer of a civil action to another district wherein the Defendant is not amenable to process. Shapiro vs. Bonanza Hotel Company, 185 F.2d 777 (9th Cir. 1959) and Foster-Milburn Company vs. Knight, 181 F.2d 951 (2d Cir. 1950). The proviso "where it might have been brought" contained within §1404(a) limits the District Court's discretionary power to transfer a civil action to a district where both venue would have been proper and the Defendant would have been amenable to process.

2. The question of STONE COMMODITIES' amenability to process in the Eastern District of California has been previously and conclusively determined by virtue of the Order of Dismissal entered in that Court on April 17, 1978. At that time, the Eastern District of California decided that STONE COMMODITIES, an Illinois Corporation, which maintains its principal place of business in the State of Illinois, did not have sufficient minimum contacts with the State of California to warrant the assumption of personal jurisdiction, and that it would not be reasonable to require STONE

COMMODITIES to defend against the claim asserted in a distant forum without violating the constitutional principles of the Due Process Clause. International Shoe Company vs. Washington, 326 U.S. 310, (1945), and World Wide Volkswagen Corporation vs. Woodsen, 100 S. Ct. 559 (1980). Therefore, it was improper for the Northern District of Texas to permit WALTER STRAUS to relitigate the question of STONE COMMODITIES' amenability to process in the Eastern District of California, which issue had once been litigated and adjudicated by a Court of competent jurisdiction, inasmuch as WALTER STRAUS was itself a party defendant to the California action at the time STONE COMMODITIES was dismissed therefrom on grounds of lack of in personam jurisdiction. Junious vs. Food Transport, Inc. 258 F. Supp. 508 (D.C. Penn. 1966). Certainly, the nature and quality of STONE COMMODITIES' contacts with the State of California had once been thoroughly examined by the Eastern District of California, and WALTER STRAUS' now present belief that the Order dismissing STONE COMMODITIES from the California litigation was incorrect does not alter the role played by STONE COMMODITIES in this commercial transaction and its contacts with the State of California arising out of and incidental to that transaction. STONE COMMODITIES simply does not now have, nor has it had at anytime contacts with the State of California which would subject it to in personam jurisdiction in that state. WALTER STRAUS has sought to accomplish indirectly what the Eastern District of California has previously determined could not be done directly, which action has caused unreasonable expense for the litigants and has hindered the orderly administration of justice.

3. WALTER STRAUS' position that STONE COMMODITIES waived its rights by failing to obtain a stay of the transfer Order and that the mandamus should not have issued for reason that the physical

transfer of the papers to the Eastern District of California had already been accomplished, overlooks the fact that the Northern District of Texas was powerless to order the transfer of the case. WALTER STRAUS fails to recognize that the transfer is not one that is being attacked on the basis of an abuse of discretion by the Northern District of Texas, but it was attacked on the ground that the Northern District of Texas was powerless to accomplish such transfer and, therefore, the Order of transfer was a nullity. This distinction is clearly recognized by the Second Circuit in Farrell vs. Wyatt, 408 F. 2d 662 (2nd Cir. 1969), where the Court stated at Page 664:

> "In any event, the question here is whether the district court had power to order the transfer; when that is the issue, we reject the argument of the United States that the clerk's physical transfer of the file destroyed our jurisdiction. As we said in Foster-Milburn Co. vs. Knight, 181 F.2d 949, 951 (2d Cir. 1950), if the district court had no power to transfer, 'the transfer will be a nullity,' the transferee court 'will have no jurisdiction***, and any judgment it may enter will be void.' The contrary intimations of lack of jurisdiction in Drabik and Magnetic Engineering & Manufacturing Co. v. Dings Manufacturing Co., 178 F.2d 866 (2d Cir. 1950), were expressed in the context of a claimed abuse of discretion."

Because of STONE COMMODITIES' prior dismissal from the California action and that Court's lack of in personam jurisdiction, the transfer ordered by the Northern District of Texas was without authority, and constituted a usurpation of power. The transfer Order was a nullity, and as such, the Fifth Circuit was not divested of jurisdiction. See Majewski vs. New York Central Railroad Company, 227 F. Supp. 950 (D.C. Mich.

1964). STONE COMMODITIES submits that the Court of Appeals for the Fifth Circuit properly exercised its supervisory jurisdiction over the Northern District of Texas, and the exercise of its mandamus power was authorized in order to vacate a transfer Order which violated the constitutional rights of STONE COMMODITIES and was a nullity. Farrell vs. Wyatt, 408 F.2d 662 (2nd Cir. 1969) and Commercial Lighting Products, Inc. vs. U.S. District Court, 538 F.2d 1078 (9th Cir. 1976).

4. The case authorities cited by WALTER STRAUS in support of its contentions are not determinative of the issues presently before this Court. Each of said authorities is based upon the assumption that the transfer was made to a permissible transferee Court, that is, the transfer was made to a transferee district "where it might have been brought". See Starnes v. McGuire, 512 F.2d 918 (D.C. Cir. 1974). The reasoning in those cases is that upon the actual physical transfer of the papers to a permissible transferee district, the transferor Circuit suffers a loss of jurisdiction over the case. For the reasons stated above, the transfer ordered by the Northern District of Texas was not made to a permissible transferee court. Therefore, WALTER STRAUS' authorities are easily distinguished and do not apply to the facts of this case. The decision of the Fifth Circuit to grant STONE COMMODITIES the Writ of Mandamus does not conflict with the line of authorities relied upon by WALTER STRAUS, nor does it have the effect of overturning a long established rule of law as contended by WALTER STRAUS. Each of the judicial decisions cited by WALTER STRAUS involves an Order of transfer made by a District Court which was duly empowered to do so. However, in this case the Northern District of Texas did not have the authority to transfer the action to a district where it could not have originally been brought, and, as stated earlier, the threshold question addressed by the Fifth Circuit was whether the

Northern District of Dallas had the power to order the transfer. Further, STONE COMMODITIES' submits that In Re: Southwestern Mobile Homes, Inc. 317 F.2d 65 (5th Cir. 1963), cited by WALTER STRAUS, was dealing with a transfer that was being attacked on the ground that there was an abuse of the federal District Court's discretion, rather than on the ground that the District Court did not have the power to order the transfer, although it is not entirely clear from the opinion. If so construed, the opinion of the Court in In Re: Southwestern Mobile Homes, Inc. can then be reconciled with the decision in Farrell vs. Wyatt, supra. The Fifth Circuit has acknowledged by its decision in this case that its previous holding in In Re: Southwestern Mobile Homes, Inc. did not control the disposition of the issue presented by the facts of this case where STONE COMMODITIES' complaint was not that the District Court abused its discretion, but that the District Court did not have the power to order the transfer.

5. STONE COMMODITIES acted promptly in exercising the sole remedy available following the transfer Order made by the Northern District of Texas. The Order transferring the case to the Eastern District of California was interlocutory and non-appealable. American Fidelity Fire Insurance Company vs. United States District Court for the Northern District of California, 538 F.2d 1371 (9th Cir. 1976). An application for stay of the transfer by the Northern District of Texas was not necessary or required for reason that the Northern District of Texas was without authority to order the transfer, and its attempt to do so was a nullity. Therefore, the Fifth Circuit did not lose jurisdiction over the case by the mere fact that the papers of the action were physically lodged in the Eastern District of California. And if an application for stay would have been the better practice prior to petitioning for a Writ of Mandamus, which STONE COMMODITIES does not here

concede, STONE COMMODITIES submits that WALTER STRAUS has suffered no material prejudice or harm by the failure to apply for a stay for the reason that the Eastern District of California, under a Status Order entered on August 13, 1980, is holding in abeyance all further proceedings in the California action until WALTER STRAUS' Petition for Writ of Certiorari is finally adjudicated. This Status Order was motivated by the Eastern District of California's recognition of the Fifth Circuit's continued authority over the question of the propriety of the Order of transfer made by the Northern District of Texas, and its expressed intention to be bound by the decision of the Fifth Circuit.

The contention of WALTER STRAUS that Farrell vs. Wyatt, supra, creates chaos and a conflict between the Circuits is without merit. For neither Congress, nor any Court has the power to disregard the provisions of the Due Process clause of the United States Constitution, and thereby cause a person to be subjected to a trial in a foreign jurisdiction which cannot properly acquire in personam jurisdiction over such person. The only conflict which has been created is that which was engendered by the Order of transfer entered by the Northern District of Texas, which was made in complete disregard of the prior determination made by the Eastern District of California that STONE COMMODITIES was not amenable to process in said jurisdiction, and in violation of STONE COMMODITIES' right to Due Process under the law. The decision of the Fifth Circuit was soundly based upon a precise understanding of the lawful permameters of §1404(a) and the fundamental constitutional principles underlying same.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari of WALTER STRAUS should be denied.

Respectfully submitted,

JOHNSON & CHRISTOPHER
AND
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BY: /s/ Harvey L. Hardy
HARVEY L. HARDY

ATTORNEYS FOR STONE
COMMODITIES CORPORATION,
RESPONDENT

PROOF OF SERVICE

I, HARVEY L. HARDY attorney for Respondent STONE COMMODITIES CORPORATION, a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15th day of October, 1980, I served three (3) copies of the foregoing Brief in Opposition to Writ of Certiorari upon Bruce W. Bowman, Jr., Turner, Rodgers, Sailers, Jordan and Calloway, 2400 Republic National Bank Building, Dallas, Texas 75201, and to the Honorable Robert W. Porter, U.S. District Judge, 1100 Commerce,Room 15E26, Dallas, Texas 75242, by certified mail, return receipt requested. I further certify that all parties required to be served have been served.

HARVEY L. HARDY

ORIGINAL
FILED

AUG 13 1980

CLERK, U. S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MADE-RITE SAUSAGE CO.,
a California corporation,

Plaintiff,

v.

WALTER STRAUS & SON, INC.,
et al.,

Defendants.
_____/

NO. CIVIL S-77-488 LKK

STATUS ORDER

Pursuant to Court Order, a Status Conference was held in Chambers on August 11, 1980. ROBERT M. WHEATLEY appeared as counsel for plaintiff, RICHARD G. WORDEN appeared as counsel for defendant STRAUS, and HENRY W. CHRISTOPHER, JR. appeared as counsel for STONE COMMODITIES CORP. After hearing, the Court now makes the following findings and orders:

The parties reported that the Fifth Circuit has stayed its writ of mandamus relative to transfer of the Texas action to this court and a petition to reconsider is pending. Moreover, STRAUS will seek cert if the petition is denied. Under the circumstances, the Court will await the outcome of that litigation. The parties are ordered to report to the Court on the progress of the appeal process. The Court will set a further status conference when the matter of the appeal is finally resolved.

IT IS SO ORDERED.

DATED: August 13, 1980

LAWRENCE K. KARLTON
U.S. District Judge